

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
APPENDIX**

13
P45

75-1135

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ENID SALTER a/k/a AARON SALTER,

Appellant.

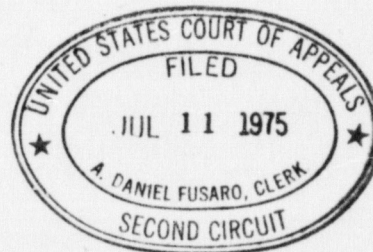
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK
CR. 1973-302.

APPELLEE'S APPENDIX

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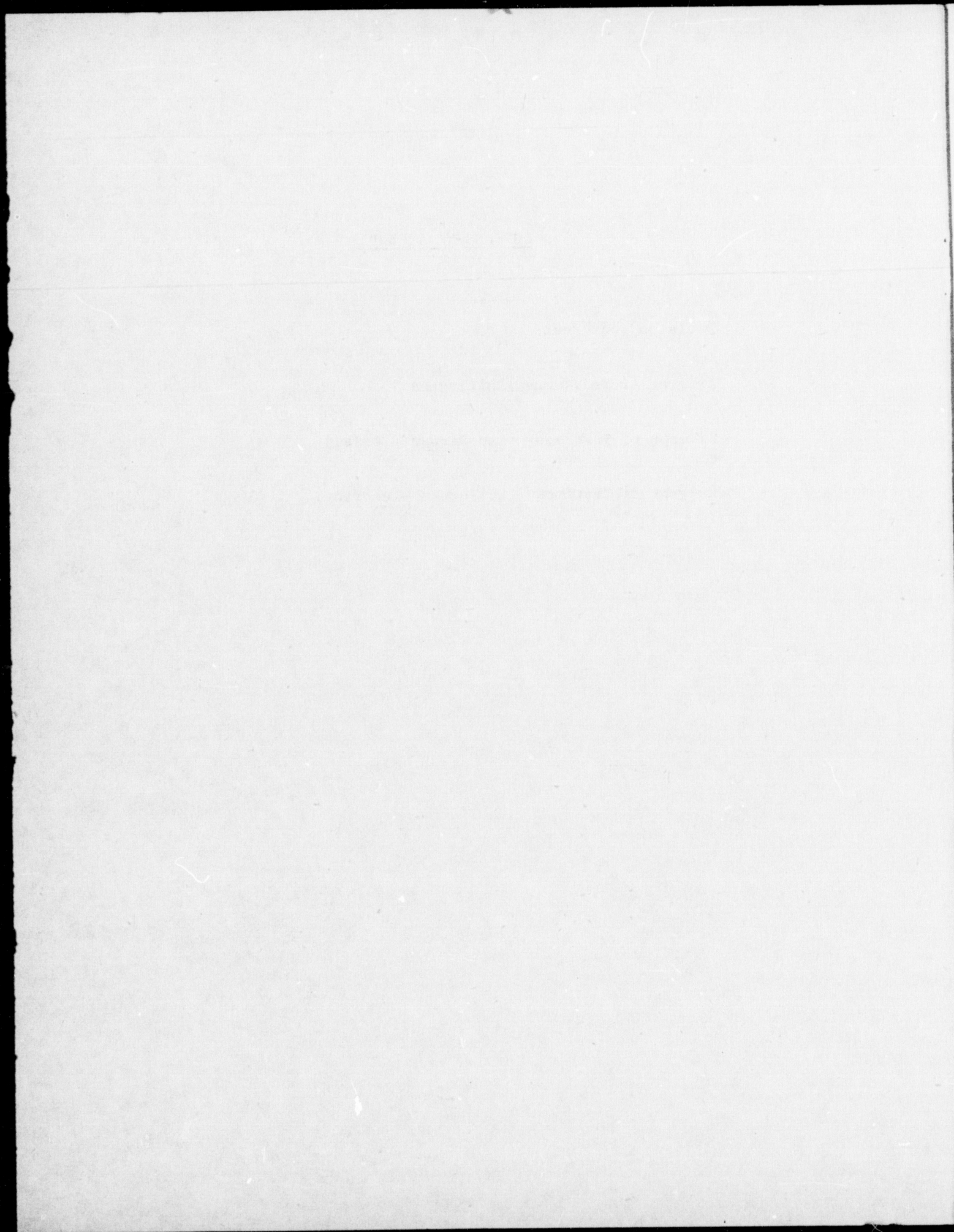
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GOVERNMENT APPENDIX

Decision and Order	1
Excerpt of Testimony (Shirley Paul)	7
Excerpt of Testimony (Leo Fernan - trial)	15
Excerpt of Testimony (Leo Fernan - hearing)	41



Decision and Order.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

-vs-

CR-1973-302

ENID SALTER, a/k/a AARON SALTER,

Defendant

APPEARANCES: JOHN T. ELFVIN, United States Attorney
(EDWARD J. WAGNER, of Counsel)
Buffalo, New York, for the Government.

JOHN H. HAPIER, Buffalo, New York,
for Defendant.

The defendant is charged in a four-count indictment with violations of Title 8, United States Code, Sections 1324(a)(1) and 1324(a)(4), unlawfully bringing aliens into the United States and unlawfully encouraging the entry of aliens into the United States. The defendant has moved to suppress certain evidence obtained by the government at the time of his arrest. In addition, the defendant has moved for a bill of particulars and for the production of certain records in the possession of the government.

Decision and Order.

-2-

This matter was pending before the late Judge John O. Henderson at the time of his death, and was subsequently reassigned to my part. After reviewing the transcript of the suppression hearing and briefs, the court has reached the following conclusions.

I. MOTION TO SUPPRESS

On July 29, 1973 when Leo Fernan, a border patrol agent, was conducting a routine inspection of persons boarding buses at the Buffalo Greyhound Bus Station, he encountered the defendant and two women waiting at the end of a line to board a bus bound for New York City. Fernan testified at the suppression hearing that he and his fellow officer approached these individuals and asked them for identification and where they were born. All three stated that they were born in Buffalo. Because the two women spoke with a "high English accent," he decided to question them further. Fernan asked the defendant to enter the baggage area and the other agent took the two women to the patrol car. After he asked the defendant to produce some identification, Salter removed his wallet and showed Fernan

Decision and Order.

-3-

a driver's license. Not satisfied with this, Fernan asked the defendant to produce more identification. Acting upon this request, Salter opened his wallet and exposed a large quantity of money in it. The Agent asked the defendant to remove and count the money. The defendant complied and the Agent counted the money and satisfied himself that it amounted to about \$800.00 in cash, much of it in Canadian money. At this point the defendant was arrested and taken to the Immigration headquarters.

The defendant seeks to suppress any evidence of Agent Fernan's observation in counting the cash in the defendant's wallet.

To be justified as a valid border search, the actions of the agents must be judged by a reasonableness standard. See United States v. Glendon, 402 F.2d 8 (2d Cir. 1968); cert. denied, 372 U.S. 609 (1969). In this case, the border patrol agent had the right to ask defendant Salter for identification to ascertain Salter's nationality. However, at the time of the request for identification, the Agent had no reason to count the

Decision and Order.

-4-

money in Salter's wallet. When asked by counsel why "it [was] necessary to count the money in [Salter's] wallet to find out his identity," Agent Fernan replied: "After he produced the license I wanted to know how much was in there because it was . . . substantial." [Tr. at 18.] The seizure of the money cannot be justified on the basis of "plain view" because that doctrine cannot be invoked without a prior justification for the intrusion. Coolidge v. New Hampshire, 403 U.S. 443 (1971). Justification to ask for the production of identification does not include the authority to search a person's wallet while he is in the act of producing such identification. In determining the legality of a search, the court must look to what information the officers had at the time the search was made, not at what contraband was discovered as a result of the search. See, e.g., Mapp v. Ohio, 367 U.S. 693 (1961); see also, United States v. Brodzik, 366 F.Supp. 295 (W.D.N.Y. 1973). Under the above criterion, Agent Fernan did not have sufficient information at the time of his request for Salter's identification to sustain a search for Canadian

Decision and Order.

-5-

money. The money itself is suppressed. However, the court will defer ruling upon the conversation between agent and defendant until the time of trial.

II. BILL OF PARTICULARS

The defendant's motion for a bill of particulars in this case is granted.

III. DISCOVERY


In his motion for discovery, the defendant seeks to compel the government to produce books, papers, documents and records showing the entry into the United States by the defendant, and the automobile allegedly transporting the aliens as alleged in the indictment. The government has declined to provide the defendant with such records on the grounds that the request is for evidentiary detail rather than the material necessary to prepare his defense. In a letter dated January 18, 1974 directed to the Honorable John O. Hendrickson, before whom this matter was then pending, the defendant spells out in greater detail the records he seeks. He states that there is an electronic device or typewriter-like machine

Decision and Order.

-6-

that is located in each booth at the Peace Bridge border crossing, and this machine, when given the registration number of the automobile about to enter the United States, registers either a positive or negative answer in a split second. The defendant, by his attorney, states that upon information and belief this device is connected to a computer located in San Diego, California and that he further believes that the computer has a memory bank which would show how many times the automobile entered the United States on a given day. He goes on to state that such records would bear heavily on his defense in this matter. The court believes that if such records are available, they should be produced. Therefore, the government is ordered to conduct an inquiry to determine whether the computer in question contains the information that the defendant seeks and, if so, the government is ordered to produce it.

So ordered.



JOHN T. CURTIN
United States District Judge

DATED: August 8, 1974

Excerpt of Testimony (Shirley Paul).

148

* * *

1 Q And before you arrived at Fort Erie?

2 A Yes.

3 Q And what did he say to you?

4 A He said if I am asked where I was born, I should say
5 "Buffalo", and he gave me, - he said to tell Buffalo
6 and where I am going, I should say "Buffalo", and then
7 he gave me an identification card and his wife, I
8 should tell them of the names on it, so I saw Carol
9 Salter, so I told them Carol Salter.

10 Q Let's back up a bit. When did you have this conversa-
11 tion in the automobile?

12 A This was before reaching Fort Erie.

13 Q Did Mr. Salter say anything else to you before you
14 reached Fort Erie about where you were going, what you
15 were doing?

16 A He told me when we were in Toronto that we were going
17 to New York and when I reached here, the Peace Bridge,
18 if they asked me where I was born, I should say "Buffalo",
19 and where I was going. If they asked me where I was
20 going, I should tell them New York.

21 Q All right. Now, what happened at Fort Erie?

22 A They stop the car.

23 Q Who was driving?

24 A Mr. Salter stop the car and left Myrtle and Mrs. Salter
25 at Fort Erie and told me that he is taking me across and

Excerpt of Testimony (Shirley Paul).

149

1 then come back for Myrtle, but I am not to worry because
2 Myrtle will be right there with me in a little while.

3 Q Where were you seated in the automobile before you
4 arrived at Fort Erie?

5 A I beg your pardon?

6 Q Where were you sitting in the car before you got to
7 Fort Erie?

8 A I was sitting in the back of the car.

9 Q And did you remain in the back of the car after the
10 other passengers got out?

11 A No.

12 Q Where did you go?

13 A I went around to the front and the two kids went in the
14 back.

15 Q And who else was in the front seat?

16 A Mr. Salter and I.

17 Q Did you have any conversation at that point before
18 leaving the, - well, where were you stopped in Fort
19 Erie?

20 A We stop at a restaurant.

21 Q Did you have any conversation before leaving the
22 restaurant or before the automobile actually left the
23 restaurant?

24 A Yes.

25 Q What did Mr. Salter say to you?

Excerpt of Testimony (Shirley Paul).

1 A He said he will be taking me across the bridge and
2 then he will come back for Myrtle, but I am not to
3 worry, because Myrtle will be right there in a little
4 while, but he don't want to take all two of us at the
5 same time.

6 Q Did he give, - well, did you have any other conversation
7 before arriving at the bridge?

8 A Yes, sir. He say if I am asked - -

9 Q If you are what?

10 A If I am asked for an identification, I should show them
11 the identification which he gave me which belonged to
12 his wife.

13 Q Was there any name on the identification?

14 A Yes, sir.

15 Q What was the name?

16 A Carol Salter, born sometime in December, 1946.

17 Q Did he say anything else before you arrived at the
18 bridge?

19 A He say if I am asked who I am, I should tell them that
20 I am his wife and show them the identification and
21 told the kids if they are asked who I am, they should
22 say that I am their mother.

23 Q Was there any other, any further conversation that you
24 recall

25 A I don't remember.

Excerpt of Testimony (Shirley Paul).

151

1 Q Now, where did you go from the restaurant?
2 A Went straight and - -
3 Q You went where?
4 A Straight across to the bridge, to the Peace Bridge.
5 Q How great or how great a distance was it from the
6 restaurant to the bridge, approximately?
7 A I am sorry, but I don't have any idea. See, it was my
8 first time and I was kind of lost.
9 THE COURT: All right. You cannot judge, right?
10 THE WITNESS: No.
11 THE COURT: You don't know. All right. Next
12 question, Mr. Burns.
13
14 BY MR. BURNS:
15 Q You arrive at the bridge?
16 A Yes.
17 Q What happened when you got to the bridge?
18 A When we got to the bridge, a man - -
19 Q Now, did you cross the bridge?
20 A Yes, sir.
21 Q Was Mr. Salter still driving?
22 A Yes.
23 Q And what happened? Well, when did you next stop, when
24 did the automobile next stop?
25 A The auto stop was at Mr. Salter's house.

Excerpt of Testimony (Shirley Paul).

1 Q No. Where was the next stop you made after the
2 restaurant?

3 A We stop at the bridge. That was our first stop.

4 Q Do you know at what point at the bridge you stopped?

5 A Yes. We stop where some uniformed men is, like some
6 Immigration Officers, something like that.

7 Q Was that on one of the sides of the bridge?

8 A Yes.

9 Q Which side of the bridge?

10 A I think it was the right side. It was the right side.

11 Q No.

12 A Oh, you mean - -

13 Q Did you stop before you crossed the bridge or after
14 you crossed the bridge?

15 A Before we crossed the bridge.

16 Q You stopped before you crossed the bridge?

17 A Yes.

18 Q All right. What happened at that stop?

19 A A man asked, seemed to be an Immigration Officer, asked
20 Mr. Salter, - I am not sure what he ask him but he said,
21 "New York", and he said something to me which, - he
22 asked me something too, which I didn't understand what
23 he said and Mr. Salter said "New York", and that was it.
24 There were no more questions.

25 Q Well, did you volunteer any information at the bridge?

Excerpt of Testimony (Shirley Paul).

153

1 Did you answer any question at the bridge?

2 A No.

3 Q All right. Did you make any stop on the other side of

4 the bridge?

5 A No, sir.

6 Q Where did you go from that point?

7 A We went to Mr. Salter's house.

8 Q And did you make any stops between the bridge stop

9 and Mr. Salter's house?

10 A No.

11 Q Which automobile was this?

12 A I'm sorry. I just, - we made one stop.

13 Q All right. Where did you stop?

14 A We stop someplace in Buffalo. Mr. Salter said he

15 was getting his car.

16 Q What automobile were you in at this point?

17 A The same one that took me from Toronto.

18 Q The Cadillac?

19 A Yes.

20 Q All right. What happened at the stop in Buffalo?

21 A After stopping at Buffalo, we didn't make anymore

22 stops until we reached Mr. Salter's house.

23 Q And what did you do at Mr. Salter's house?

24 A He said I should stay there with the kids until he go

25 for Myrtle and his wife.

Excerpt of Testimony (Shirley Paul).

- 1 Q Was there anyone else at that house?
- 2 A Yes, sir.
- 3 Q Who else was there?
- 4 A The two kids were there with me, just the kids.
- 5 Q When you arrived with the children, were there any
- 6 other people in the house?
- 7 A No, sir.
- 8 Q All right. Where did you go? What other conversation
- 9 did you have at that point with Mr. Salter?
- 10 A He said he was going for Myrtle and his wife and if
- 11 anyone come to him or call him and ask where he is,
- 12 I should tell them I don't know.
- 13 Q What did Mr. Salter do after that?
- 14 A He left. He say he was going for Myrtle.
- 15 Q And did he return to the house?
- 16 A He returned to the house with Myrtle and his wife.
- 17 Q Approximately how much later? Do you recall how much
- 18 time elapsed?
- 19 A Between three quarters of an hour to an hour, something
- 20 like that. I don't direct remember how long.
- 21 Q And what was, - was Mr. Salter alone when he returned?
- 22 A He return with Myrtle and his wife.
- 23 Q Did you see the automobile in which she was riding?
- 24 A Yes.
- 25 Q What, - could you describe that automobile?

Excerpt of Testimony (Shirley Paul).

- 1 A. Myrtle, Mr. Salter and I.
- 2 Q. And what did you do at the bus terminal?
- 3 A. We bought our tickets.
- 4 Q. What ticket did you buy?
- 5 A. A one-way ticket to Port Authority.
- 6 Q. Do you know where this bus was destined to go?
- 7 A. Yes, sir, New York City.
- 8 Q. Where was Mr. Salter when you purchased the ticket?
- 9 A. He was right there with us.
- 10 Q. What did you do after you purchased the ticket?
- 11 A. After we purchased the ticket, we headed for the bus.
- 12 Q. Where was the bus?
- 13 A. It was parking outside of the Greyhound Bus Terminal.
- 14 Q. Did you have anymore conversation with Mr. Salter after
- 15 purchasing your ticket and before you went to the bus?
- 16 A. Yes, sir.
- 17 Q. Regarding the, - well, strike that question. Did you
- 18 then go to the bus?
- 19 A. Yes, sir.
- 20 Q. What did you do at the bus?
- 21 A. Myrtle and I started for the bus when we were actually
- 22 in the bus when a man asked us for identification.
- 23 Q. When you arrived at the bus, were there any other people
- 24 around near the bus?
- 25 A. Yes, sir.

Excerpt of Testimony (Leo Fernan—Trial).

212

1 is the quality of the testimony, so I
2 can see no point in further discussion
3 here on this point and, therefore, Mr.
4 White, will you have the jury come up,
5 please, and we will continue.

6
7 (Jury returns to the courtroom.)

8
9 THE COURT: Ladies and gentlemen, I am sorry
10 about the delay. There were certain
11 things that came up that it was necessary
12 for me to attend to. At any rate, we
13 are back now. Mr. Burns, call your next
14 witness.

15 MR. BURNS: Yes, your Honor; Leo Fernan.

16
17
18 L E O J. F E R N A N (15 Kingswood Drive, Orchard Park,
19 New York), a witness called by and in behalf of the Government,
20 having been first duly sworn, was examined and testified as
21 follows:

22
23 DIRECT EXAMINATION BY MR. BURNS:

24 Q Mr. Fernan, where are you employed?

25 A I am employed with the Border Patrol, Niagara Street,

Excerpt of Testimony (Leo Fernan—Trial).

- 1 Buffalo, New York.
- 2 Q What is your position with the Border Patrol?
- 3 A Border Patrol Agent.
- 4 Q How long have you been so employed?
- 5 A Six and a half years.
- 6 Q Were you assigned to the Buffalo Office in July of '73?
- 7 A Yes, I was.
- 8 Q What are the various duties of a Patrol Agent?
- 9 A A Patrol Agent patrols the boundary line between
- 10 Canada or Mexico or by water and primarily in the
- 11 Buffalo area transportation facilities such as train,
- 12 bus and rail.
- 13 Q For what purpose?
- 14 A To prevent or apprehend illegal aliens entering the
- 15 United States.
- 16 Q Were you conducting these duties on July 29, 1973?
- 17 A Yes, I was.
- 18 Q In connection with those duties, did you go to the
- 19 Greyhound Bus Terminal?
- 20 A Yes, sir.
- 21 Q Do you recall approximately when you went to the
- 22 terminal that day?
- 23 A We were there from 3:30 until midnight and off and on
- 24 we checked incoming and outgoing busses.
- 25 Q When you say "we", who do you mean?

Excerpt of Testimony (Leo Fernan—Trial).

214

- 1 A Border Patrol Agent Chandler. At that time, he was in
2 the Border Patrol.
- 3 Q And what do you customarily do at the bus terminal?
- 4 A Well, check various people in there or check whole
5 busses entering the terminal or leaving the immediate
6 area.
- 7 Q How do you check persons?
- 8 A We ask them to state their citizenship, first of all,
9 to identify themselves and we state we are conducting
10 an immigration check and if they are citizens please
11 state so and if they are aliens, show what identification
12 they have.
- 13 Q And what kind of dress are you wearing?
- 14 A Plain clothes.
- 15 Q And what kind of clothes do you usually wear?
- 16 A Suitcoat and tie, sportcoat.
- 17 Q Do you usually work in plain clothes?
- 18 A Plain clothes, yes.
- 19 Q Do you wear a uniform on some occasions?
- 20 A Yes. Mostly in the daytime if you are working alone
21 or if you are an extra man.
- 22 Q And what did you do at the Greyhound Bus Terminal that
23 day?
- 24 A That day, like I say, we were there from 3:30 until
25 midnight and we worked various other information in the

Excerpt of Testimony (Leo Fernan—Trial).

1 city and we returned to check the New York bound
2 busses in and out.
3 Q Did you check any New York bound busses that night or
4 that day?
5 A Yes, we did.
6 Q Do you recall approximately how many you may have
7 checked?
8 A Oh, I think probably three that day.
9 Q Did you check one during the evening hours?
10 A Yes.
11 Q And what did you do in checking the bus?
12 A The bus loads at Platform 6 and we were there checking
13 all passengers after they turned in their tickets to the
14 drivers, checking everybody getting on the bus leaving
15 the area.
16 Q Are you physically on the bus itself?
17 A That night we were by the door when everybody was
18 boarding it.
19 Q And did you check persons boarding that bus that evening?
20 A Yes, sir.
21 Q Now, did you, that evening, speak with an individual
22 named Salter?
23 A Yes, sir, I did.
24 Q Do you see that individual in the courtroom today?
25 A Yes, sir.

Excerpt of Testimony (Leo Fernan—Trial).

216

- 1 Q Would you point him out, please?
- 2 A Sitting to my right at the table.
- 3 Q The gentleman with the plaid jacket?
- 4 A Yes, and the glasses.
- 5 Q Did you see him at the bus terminal that night?
- 6 A Yes, sir.
- 7 Q When did you see him?
- 8 A Approximately between 9:25 and 9:30.
- 9 Q Where was he when you saw him?
- 10 A Right by the bus, the door to the bus.
- 11 Q Which bus was this?
- 12 A The New York bound bus.
- 13 Q Was anyone else with him?
- 14 A Yes, sir.
- 15 Q What did you do when you saw Mr. Salter standing there?
- 16 A Well, we approached him. We had checked everybody
- 17 getting on and we had gone around the back of the bus
- 18 station to the other door and we saw there was a couple
- 19 more people getting on by the door so we went back
- 20 through the terminal.
- 21 Q When you say "we", you mean - -
- 22 A Border Patrol Agent Chandler and myself, so we approached
- 23 the bus and asked them to identify themselves and to
- 24 state their citizenship and where they were born.
- 25 Q Now, to whom did you address those questions?

Excerpt of Testimony (Leo Fernan—Trial).

1 A I addressed Mr. Salter and my partner Ronald Chandler
2 addressed the two girls. There was three, a total
3 of three standing by the bus.

4 Q Did you show any credentials?

5 A Yes sir, we did.

6 Q What were the relative positions of these three
7 individuals?

8 A Close proximity to the bus. The door was open to
9 the bus and they were on the platform and the only
10 reason I think that they hadn't gone on the bus was
11 the driver wasn't there yet to take the ticket.

12 Q Did you ask any questions of Mr. Salter?

13 A Yes. sir.

14 THE COURT: Ladies and gentlemen, I think it
15 would be best if we took a short break.
16 Just go in the corridor. There is
17 something I want to look into here.

(Jury escorted from courtroom.)

18
19
20 THE COURT: Mr. Napier, referring to the order
21 in this case which has been previously
22 filed, filed on August 8, 1974 that at
23 Page 4, the top of Page 5, we talked
24 about, - we know that later on Mr.
25 Fernan counted the money in Mr. Salter's

Excerpt of Testimony (Leo Fernan—Trial).

1 wallet and in my opinion starting at
2 the bottom of Page 3 I said, "to be
3 justified as a valid Border Search the
4 action of the Agents must be met by a
5 reasonable standard", citing the United
6 States versus Glaziou. "In this case
7 the Border Patrol Agent had the right
8 to ask the defendant Salter for identi-
9 fication to ascertain Salter's nationality.
10 However, at the time of the request for
11 identification the Agent had no reason
12 to count the money in Salter's wallet.
13 When asked by counsel why 'it was
14 necessary to count the money in (Salter's)
15 wallet to find out his identity,' Agent
16 Fernan replied 'after he produced the
17 license I wanted to know how much in
18 there because it was substantial'. The
19 seizure of the money can not be justified
20 on the basis of plain view because that
21 doctrine can not be invoked without a
22 prior justification for the intrusion.
23 Justification to ask for the production
24 of identification does not include the
25 authority to search a person's wallet

Excerpt of Testimony (Leo Fernan—Trial).

219

1 while he is in the act of producing such
2 identification. To determine the legality
3 of the search the Court would look to
4 what information the officers had at
5 the time the search was made, not at
6 what contraband was discovered as a
7 result of the search. Under the above
8 criterion Agent Fernan did not have
9 sufficient information at the time of
10 his request for Salter's identification
11 to sustain a search for Canadian money.
12 The money itself is suppressed. However,
13 the Court will defer ruling upon the
14 conversation between Agent and defendant
15 until the time of trial."

16 We are now at the stage where Mr.
17 Fernan and Salter had a conversation.
18 What do you say? Shall we listen to it
19 or shall we not?

20 MR. NAPIER:

21 I don't think we should listen to
22 it, your Honor, because I think the
23 conversation is prompted by his identify-
24 ing himself as a Border Patrol Agent and
25 seeking or requesting identification
from Mr. Salter. Now, he gained the

Excerpt of Testimony (Leo Fernan—Trial).

1 information as to there being money in
2 the wallet by asking for identification
3 and I don't think he should get the
4 windfall of the money or the conversation
5 that stemmed because, - stemmed from his
6 learning that there was money in there
7 of a smaller or large amount. In other
8 words, I think that to use the expression,
9 the money is kind of like the fruits
10 from a bad vine.

11 THE COURT:

I am going to permit the conversa-
12 tion but Mr. Fernan, can you explain?
13 You asked him for identification. He
14 pulled out his wallet and as I understand
15 it you saw a large sum of money.

16 THE WITNESS:

Yes sir.

17 THE COURT:

This hearing was held before Judge
18 Henderson and then I had to rule upon
19 it after Judge Henderson's death. When
20 you saw the large sum of money, then as
21 I understood what happened then, you
22 counted the money.

23 THE WITNESS:

I asked him to count it, sir.

24 THE COURT:

You asked him to count it?

25 THE WITNESS:

Yes.

Excerpt of Testimony (Leo Fernan—Trial).

221

1 THE COURT: And there was a large sum?
2 THE WITNESS: Yes.
3 THE COURT: Do you remember what the amount
4 was?
5 THE WITNESS: Approximately seven to nine hundred
6 dollars. I don't remember exactly, sir.
7 THE COURT: Then what conversation occurred
8 after that?
9 THE WITNESS: Well, in relation to the money,
10 could I say the only reason when he
11 opened it to get his license I saw there
12 was a lot of money in there and I hadn't
13 seen any American money and I asked him
14 to count his money and I asked him where
15 he got the Canadian money from and he
16 said he was holding it for his little
17 brother.
18 MR. BURNS: Your Honor, the evidence the
19 Government would like to offer through
20 this witness is he asked for identifica-
21 tion and the identification was produced
22 by the defendant taking his wallet out
23 of a pocket and pulling the card out.
24 At that time when the card was being
25 produced Agent Fernan noticed the currency,

Excerpt of Testimony (Leo Fernan—Trial).

1 some with the color, - or the red
2 currency, Canadian bills, and the
3 thickness, let's say, showing the number
4 of bills. Now, I don't think there has
5 been any dispute whatsoever about the
6 question, - about the Agent asking for
7 the identification and the Court has
8 so held he could do that, so just as he
9 could ask for that he could testify
10 what color the wallet might be and
11 certainly he could testify to what else
12 he saw just standing there.

13 THE COURT:

What else he saw, but what I thought
14 was objectionable was having the man
15 count the money out and having conversa-
16 tion about - -

17 MR. BURNA:

Of course, we don't contest the
18 Court's ruling on that part. We offer
19 nothing on the actual counting of it.

20 THE COURT:

And what he saw, when he produced
21 his wallet if he saw it was Canadian
22 money, we will permit that. You could
23 see that was Canadian bills. Go ahead,
24 Mr. Burns.

25 MR. BURNS:

Just to the extent he observed

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THE COURT:

THE WITNESS:

MR. BURNS:

MR. NAPIER:

MR. BURNS:

THE COURT:

THE WITNESS:

THE COURT:

THE WITNESS:

THE DEFENDANT:

I was never advised of my rights.

Excerpt of Testimony (Leo Fernan—Trial).

224

1 MR. NAPIER: He was never advised of his rights
2 at the Greyhound Bus Station.
3 MR. BURNS: That's true.
4 THE DEFENDANT: Neither there or downtown.
5 THE COURT: Mr. Salter, you make your remarks
6 to your lawyer. Don't you make remarks
7 because you don't know what the problem
8 is.
9 MR. BURNS: After the aliens, the two alien
10 women had given statements to Agent
11 Chandler then Agent Chandler and Agent
12 Fernan compared notes and Mr. Salter
13 was placed under arrest.
14 THE COURT: I find under the circumstances here
15 that we have discussed there was no
16 obligation at this time for Mr. Fernan
17 to advise Mr. Salter of his rights to
18 remain silent or any other Miranda type
19 warnings, so we will have the jury come
20 back.
21 MR. NAPIER: May I just say this, your Honor,
22 that Mr. Fernan, it is Fernan, that is
23 using the authority or the cloak of
24 authority to ask Mr. Salter to produce
25 identification and he accidentally finds

Excerpt of Testimony (Leo Fernan—Trial).

1 out when the identification or license
2 is produced by Salter that he has some
3 Canadian money. Now, I just don't think
4 that he is entitled to get into evidence
5 that proof. There is no charge being
6 made.

7 THE COURT: I will overrule the objection and
8 permit him to testify to what he saw.

9 MR. BURNS: But not as to counting it.

10 THE COURT: Not as to the count.

11
12 (Jury returns to the courtroom.)
13

14 BY MR. BURNS:

15 Q Mr. Fernan, when you approached Mr. Salter at the
16 bus terminal did you ask him any questions?

17 A Yes sir.

18 Q Where were you when you approached him, again?

19 A On the platform of Gate Number 6.

20 Q What questions did you ask him?

21 A I identified myself as a United States Border Patrol
22 Agent and asked him to state his citizenship, to which
23 he said "Buffalo".

24 Q Did you ask him any other questions on the platform?

25 A No.

Excerpt of Testimony (Leo Fernan—Trial).

- 1 Q Did you ask him any questions anywhere else in the
2 bus terminal?
- 3 A Yes sir. I asked him to come into the baggage room.
- 4 Q Immediately after he answered your first question?
- 5 A Yes.
- 6 Q All right, and where did you go?
- 7 A Into the baggage room.
- 8 Q And did you ask him any questions there?
- 9 A Yes. I asked him what relationship or how he knew
10 these girls he was with. My partner and myself had
11 separated the girls. He went with the girls and I
12 went with Salter.
- 13 Q Agent Chandler went with the girls?
- 14 A Yes sir.
- 15 Q And where did he go?
- 16 A He proceeded across the terminal outside to our car
17 on the other side of the terminal.
- 18 Q And you went to where?
- 19 A The baggage room.
- 20 Q Is that inside the terminal?
- 21 A Yes, just below Gate 6.
- 22 Q And what did you do in the baggage room?
- 23 A I gave him a quick frisk.
- 24 Q Did you ask him any questions then?
- 25 A Yes. I asked him for his identification.

Excerpt of Testimony (Leo Fernan—Trial).

- 1 Q What did he do when you asked him for the identification?
- 2 A He opened his wallet and was producing a license and
- 3 that's when I saw - -
- 4 Q What did he produce when you asked for identification?
- 5 A A license.
- 6 Q Where did he get the license?
- 7 A From a wallet.
- 8 Q And where did he get the wallet?
- 9 A From his pocket.
- 10 Q Did he pull this out in your presence?
- 11 A Yes.

12 THE COURT: Mr. Burns, we would go a lot faster
13 and easier with less trouble if you
14 would simply let Mr. Fernan tell us in
15 his own words what occurred. We don't
16 have to have you interject step by step.
17 Mr. Fernan, simply tell us you were
18 there with Mr. Salter. You tell us
19 what you said and what he said and what
20 happened.

21 THE WITNESS: From the quick frisk, after we
22 entered the baggage room and gave him
23 a quick frisk, asked him to produce his
24 identification. He took out a license
25 and that's when I saw the money and I

Excerpt of Testimony (Leo Fernan—Trial).

1 asked what relationship or how do you
2 know these girls, how long have you
3 known these girls and where did you
4 meet them and he stated he met them in
5 Buffalo that day.

6
7 BY MR. BURNS:

8 Q You say when he produced his identification you saw
9 some money. Where did you see the money?

10 A In his wallet.

11 Q Did you know, - well, how thick was the, - what kind
12 of money was this?

13 A At the time I saw some red money and, - when he opened
14 his wallet to get his license.

15 Q And what thickness was the currency?

16 A Well, it was quite, - well, I couldn't say exactly
17 inch wise, but it was just a thick wallet of money.

18 Q All right, and what questions did you ask him then or
19 after, regarding his citizenship?

20 A I asked him again if he knew these girls and where he
21 knew these girls from which he stated he met them in
22 Buffalo that day and then I asked him to count his
23 money.

24 Q Well, did you ask any further questions relating to
25 the girls?

Excerpt of Testimony (Leo Fernan—Trial).

1 A Yes. Well, he told me he met them in Buffalo that day
2 and - -

3 Q Did you ask him what he had done that day, where he
4 had been ?

5 A In Buffalo and he said he was at a motel and he was
6 shacking.

7 MR. NAPIER: In Buffalo at a motel where?

8 THE COURT: He said he was at a motel in
9 Buffalo. Did there come a time when he
10 counted the money?

11 THE WITNESS: Yes.

12 THE COURT: Did you then at that time see what
13 kind of money it was?

14 THE WITNESS: It was some Canadian and some
15 American currency.

16 MR. NAPIER: This I object to, your Honor.

17 THE COURT: All right. I will overrule the
18 objection. Mr. Burns.

19
20 BY MR. BURNS:

21 Q Did you ask him any other questions?

22 A I ask him where he got that money. He said he was
23 holding it for his little brother and I ask him if he
24 had been in Canada that day and he said "no", that he
25 had been in Buffalo all day with the girls.

Excerpt of Testimony (Leo Fernan—Trial).

1 Q Did you ask him any further questions?

2 A That's when I asked him to count the money. He sat
3 down on the steps of the baggage room, the staircase
4 to the upstairs and he was counting the money and after
5 he counted the money he kept the money and I said "wait
6 right here", and I was waiting for my partner to come
7 back.

8 Q And what did you do when your partner came back?

9 A He says "well, the girls broke. He did bring them
10 in. They stated it." He says "he's under arrest".

11 MR. NAPIER: I object to that, your Honor.

12 MR. BURNS: That, of course, is not being
13 offered for the truth of the statement
14 but just the fact that some information
15 was conveyed to Mr. Fernan.

16 THE COURT: Ladies and gentlemen, you are not
17 to take into account what the other
18 Agent said that the ladies said, but
19 there came a time when the other officer
20 came back.

21 THE WITNESS: Yes sir.

22 THE COURT: What did you do then?

23 THE WITNESS: I asked him "what did they say",
24 and he said "well, they broke".

25 THE COURT: Wait a minute. Is Mr. Salter there?

Excerpt of Testimony (Leo Fernan—Trial).

1 THE WITNESS: Yes, he was there.
2 THE COURT: In your presence?
3 THE WITNESS: Yes.
4 THE COURT: Go ahead, Mr. Burns.
5
6 BY MR. BURNS:
7 Q What did you do after your partner had returned? What
8 did you do with Mr. Salter?
9 A I proceeded to go out with him back to our office. The
10 two girls were with my partner in a Government car.
11 I had a walkie-talkie and I was going to ride with Mr.
12 Salter and my partner was going to follow behind me.
13 Q At that time did you place him under arrest?
14 A Yes. He was under arrest.
15 Q Where did you go from that point?
16 A His car was behind the Greyhound Bus Station. I
17 proceeded behind the Greyhound with the walkie-talkie
18 and I said "we are going to our office which is on
19 Niagara Street", to go down to Chippewa Street and
20 cross.
21 Q And where did you then go?
22 A We proceeded down Chippewa towards Niagara.
23 Q To where?
24 A 2151 Niagara Street, the Border Patrol Office.
25 MR. BURNS: I have no further questions.

Excerpt of Testimony (Leo Fernan—Trial).

1 THE COURT:

All right.

2
3 CROSS EXAMINATION BY MR. NAPIER:

4 Q Is Officer Chandler in the Buffalo area now?

5 A Yes sir, he is.

6 Q Is he in the courtroom?

7 A No sir.

8 Q Has he been down to the courthouse here?

9 A Yes sir.

10 Q Have you talked with him in the last couple days?

11 A Yes sir.

12 Q Well, officer, you said you saw a thick wallet of
13 money. When you looked at the wallet you saw some red
14 money which you didn't know in looking at the wallet
15 whether there was American money too, did you?

16 A No.

17 Q Now, did you arrest him before you left the Greyhound
18 Bus Station?

19 A Yes sir.

20 Q What did you say to him; did you tell him he was under
21 arrest?

22 A Mr. Chandler after coming back told him he was under
23 arrest in the baggage room.

24 Q So you are not the one that arrested him, right?

25 A Not right there. I was present.

Excerpt of Testimony (Leo Fernan—Trial).

233

- 1 Q Who arrested him?
- 2 A Mr. Chandler.
- 3 Q You said before you.
- 4 A In the baggage room.
- 5 Q Did you place him under arrest in the baggage room?
- 6 A The way it is, sir, I am pretty sure Mr. Chandler
7 placed him under arrest when he came back.
- 8 Q I'm asking about you?
- 9 A No.
- 10 Q Personally?
- 11 A No sir.
- 12 Q In fact, he was not placed under arrest until Mr.
13 Chandler returned, is that correct?
- 14 A Yes.
- 15 Q Now, where did Mr. Chandler make his inquiries of the
16 two women?
- 17 A In the Government car on the north side of the bus
18 station which is across from Platform 6.
- 19 Q Did you ask the two women what their citizenship was?
- 20 A No sir. I was asking Mr. Salter.
- 21 Q Well, weren't the three people asked out on the bus
22 platform?
- 23 A Yes sir.
- 24 Q Well, did you hear the two women asked?
- 25 A Yes sir.

Excerpt of Testimony (Leo Fernan—Trial).

1 Q What their citizenship was?

2 A Yes sir.

3 Q What did they reply?

4 A With a heavy accent "Boofalo".

5 Q But they replied "Buffalo" or "Boofalo"?

6 A "Boofalo".

7 Q In fact, were they asked where they were born?

8 A Yes sir.

9 Q And they also answered "Buffalo" at that time, did
10 they not?

11 A Yes sir.

12 Q Are you telling us, officer, I guess you have already
13 told us that Mr. Salter said that he had been in
14 Buffalo all day with the two women, is that correct?

15 A Yes sir.

16 Q Do you recall, - I better have this marked.

17 THE COURT: We can mark it later.

18 MR. NAPIER: All right. Do you recall - -

19 THE COURT: Just describe it for the record.

20
21 BY MR. NAPIER:

22 Q All right. Your Honor, this purports to be a transcript
23 of the testimony taken before the Honorable Judge
24 Henderson on January 15, 1974 and it purports to be
25 the testimony of Mr. Fernan. Mr. Fernan, do you recall

Excerpt of Testimony (Leo Fernan—Trial).

- 1 testifying in this very courtroom in this very chair
2 on January 15, 1974?
- 3 A Yes sir.
- 4 Q Do you recall testifying at that time, Page 10, third
5 line down, "then I asked him where he got the Canadian
6 money and when the last time he was in Canada. He
7 said earlier that day - -"
- 8 A Do you want me to read it?
- 9 Q Is that what it says there?
- 10 A Yes.
- 11 Q So you testified a year ago almost to the day that
12 Mr. Salter told you he had been in Canada that day.
- 13 A Sir, at that time that was what my memory said to me.
- 14 Q Well, your memory is somewhat faulty then as to what
15 actually went on.
- 16 A That's what I said that day.
- 17 Q This is more apt to be the truth, isn't it?
- 18 A Yes sir.
- 19 Q A year ago?
- 20 A Yes sir.
- 21 Q Is there any doubt in your mind that Mr. Salter told
22 you that he was holding the money for a brother?
- 23 A No sir. I remember he said he was holding it for his
24 little brother.
- 25 Q And do you recall you so testified about a year ago

Excerpt of Testimony (Leo Fernan—Trial).

1 before Judge Henderson?

2 A Yes sir.

3 Q So would it be accurate to say then that you at one
4 time understood that he got the money that day in
5 Canada?

6 A At that time.

7 Q Incidentally, when Mr. Salter was asked for identifica-
8 tion you told us he produced his license. Was there
9 anything on the license which identified him?

10 A His name.

11 Q Anything else?

12 A I don't remember anything else at the time.

13 Q Well, there was a picture on the license, wasn't there?

14 A I don't remember a picture at the time.

15 Q Well, do you recall being shown just about one year
16 ago before Judge Henderson the license with the
17 picture on it?

18 A I remember being shown a license with a picture a
19 year ago but I don't remember having seen it before.

20 THE COURT: Keep your voice up, Mr. Fernan.

21
22 BY MR. NAPIER:

23 Q Well, do you recall when you saw the license about a
24 year ago that it was a license which was existing at
25 the time of this incident?

Excerpt of Testimony (Leo Fernan—Trial).

- 1 A Can you repeat that?
- 2 Q Yes. When you examined the license at the Greyhound
3 Bus Station you observed, did you not, that it was a
4 current license?
- 5 A I can't remember if it was a current license, no.
- 6 Q Mr. Fernan, I show you what purports to be an operator's
7 license which has an expiration date 31-74 and I
8 ask you is that a picture on the rear that appears to
9 be that of Aaron Salter?
- 10 A Yes sir, it seems to be. Yes sir, it appears to be
11 him.
- 12 Q Do you recall my doing this very thing with you just
13 about a year ago?
- 14 A Yes sir.
- 15 Q I showed you the same card, didn't I?
- 16 A Yes sir.
- 17 Q You are not denying that this is the one he showed
18 you, correct?
- 19 A I'm not denying that.
- 20 MR. NAPIER: Thank you.
- 21 MR. BURNS: No further questions from the
22 Government.
- 23 THE COURT: Anything else, Mr. Napier?
- 24 MR. NAPIER: I have nothing else.
- 25 THE COURT: All right, thank you. Mr. Burns.

Excerpt of Testimony (Leo Fernan—Hearing).

1 PROCEEDINGS OF JANUARY 15, 1974, COMMENCING AT 10:05 A.M.

2
3 MR. WAGNER: United States of America versus
4 Enid Salter, also known as Aaron
5 Salter, Criminal 1973-302. This is
6 a hearing on the defendant's motion
7 to suppress. The Government would
8 call as its first witness Mr. Fernan.

9 THE COURT: What is sought to be suppressed?

10 MR. WAGNER: Your Honor, Mr. Fernan made certain
11 observations of a quantity of money
12 in the defendant's wallet in the
13 Greyhound Bus Station in Buffalo.
14 Mr. Napier apparently wants to suppress
15 any use of that evidence.

16 THE COURT: All right.

17 MR. NAPIER: That is correct, your Honor.

18
19 L E O J. F E R N A N , called as a witness on behalf
20 of the Government, and being first duly sworn, testified
21 as follows:

22 THE COURT: Now, is this an observation made
23 pursuant to a search?

Excerpt of Testimony (Leo Fernan—Hearing).

1 MR. NAPIER: That is the question, I guess, your
2 Honor.
3 THE COURT: Who is this gentleman?
4 MR. WAGNER: He is an agent for the Border Patrol.
5 He questioned Mr. Salter at the
6 bus station. In the course of his
7 questioning, prior to an actual
8 arrest, he had occasion to look
9 into his wallet and observe a certain
10 sum of money.
11 THE COURT: All right.
12 MR. WAGNER: Is that correct?
13 MR. NAPIER: Yes.
14
15 DIRECT EXAMINATION BY MR. WAGNER:
16 Q. Mr. Fernan, could you tell us what your occupation
17 is?
18 A. I'm a Border Patrol agent.
19 Q. And how long have you held such position?
20 A. Six years.
21 Q. Could you tell us, please, what duties you perform
22 as a Border Patrol agent?
23 A. To apprehend or prevent the illegal entry of aliens

Excerpt of Testimony (Leo Fernan—Hearing).

1 or smuggling of aliens.

2 Q. Are you what is called an agent of the Border Patrol?

3 A. Yes.

4 Q. And how long have you been a Border Patrol agent?

5 A. Six years.

6 Q. Were you working as a Border Patrol agent on July
7 29, 1973?

8 A. Yes.

9 Q. Could you tell us where you were working at that time?

10 A. Downtown Buffalo at the bus station, in the vicinity.

11 Q. Could you tell us, please, who you were working with
12 that day?

13 A. Ronald Chandler.

14 Q. What position does Mr. Chandler hold?

15 A. At that time he was a Border Patrol agent. Presently
16 he is in Washington.

17 Q. Would you tell us what type of activities you were
18 engaging in at the bus station?

19 A. We were checking outbound buses for New York, return-
20 ing buses, people coming back to Buffalo, and going
21 to Toronto.

22 Q. When you say you were checking buses, could you tell
23 us what you mean by that?

Excerpt of Testimony (Leo Fernan—Hearing).

1 A. People getting on the bus necessarily come into the
2 United States. They might say they were admitted
3 to come to Buffalo, but then they buy a ticket after
4 they are here and proceed on to New York or other
5 destinations.

6 Q. You are checking the people on the buses for possible
7 immigration violations?

8 A. Yes.

9 Q. Did you have occasion to encounter someone that day
10 that you suspected of perhaps being involved with
11 a violation of the immigration laws?

12 A. Yes, we did.

13 Q. Could you tell us how you got involved in that?

14 A. We were checking the outbound bus, and just before
15 it left -- this is approximately nine, between nine
16 and nine-thirty at night -- there were three people
17 left on the platform.

18 THE COURT: Speak up, please, I don't hear you.

19 THE WITNESS: It was approximately nine to nine-
20 thirty at night, and there were
21 three people left on the platform
22 that hadn't yet got on the bus.

23 They were about to, when we approached

Excerpt of Testimony (Leo Fernan—Hearing).

1 them and asked them their citizen-
2 ship.

3 BY MR. WAGNER:

4 Q. When you approached these people, they were planning
5 to board the bus did you say?

6 A. Yes.

7 Q. And where did this take place at the bus station?

8 A. It is on the south platform.

9 Q. This was outside or inside?

10 A. Outside on the platform.

11 Q. Where was the bus at this time?

12 A. At Gate Number 6.

13 Q. Approximately how far would you say they were from
14 the bus when you approached them?

15 A. Three to four feet.

16 Q. And can you tell us what you did then?

17 THE COURT: Were they in a queue?

18 THE WITNESS: Pardon?

19 THE COURT: Were they in a line?

20 THE WITNESS: Yes, they were near the door of the
21 bus

22 BY MR. WAGNER:

23 Q. Were there any other people in line with them?

Excerpt of Testimony (Leo Fernan—Hearing).

- 1 A. No, they were the last three.
- 2 Q. They were the last three to get on the bus?
- 3 A. About to get on the bus.
- 4 Q. Could you tell us, please, what you did then?
- 5 A. We identified ourselves and asked them their citizen-
- 6 ship.
- 7 Q. What did they say at that time?
- 8 A. The two girls stated they were born in Buffalo, and
- 9 Mr. Salter stated he was also from Buffalo.
- 10 Q. Can you tell us what else happened at that time?
- 11 A. Well, the two girls -- what tipped us off was the
- 12 Jamaican accent, because of the high English accent,
- 13 and we proceeded to talk to them further and asked
- 14 for identification.
- 15 Q. When you say what tipped you off, what do you mean
- 16 by that?
- 17 A. Their accent was not a typical Buffalo accent, it's
- 18 a high English accent.
- 19 Q. Have you ever heard that accent before?
- 20 A. Yes, I have.
- 21 Q. And it indicated to you that they may be from
- 22 Jamaica, is that what you said?
- 23 A. Yes.

Excerpt of Testimony (Leo Fernan—Hearing).

1 Q. What did Mr. Salter say to you?

2 A. He stated he was from Buffalo.

3 Q. Could you tell us, please, what you did after that?

4 A. Mr. Chandler took the girls and separated them from
5 Mr. Salter, and I was talking to Mr. Salter, I asked
6 him to show me some identification.

7 Q. Could you tell us, please, where this took place?

8 A. Mr. Chandler went across the waiting room and put
9 the two girls in the car and was talking to them,
10 and I went in the baggage room with Mr. Salter and
11 asked him for his identification, and he produced
12 a license at this time, exposing his wallet to me.

13 Q. And what did you do then?

14 A. I noticed the quantity of money there in Canadian
15 bills, and I asked him where he got all the money.

16 Q. What else did you do at that time?

17 A. I looked at the license, it said his name on it,
18 Mr. Salter, Enid or Aaron at the time --

19 THE COURT: I don't hear you. He what?

20 THE WITNESS: He produced his license, and while
21 he was producing his license, I
22 noticed a quantity of money, a
23 sizeable amount, in his wallet. I

Excerpt of Testimony (Leo Fernan—Hearing).

1 asked him where he got all the money.
2 He said that he was holding it for
3 his little brother. Then I asked
4 him where he got the Canadian money,
5 and when the last time he was in
6 Canada, he said earlier that day.
7 I proceeded further and asked him,
8 "Where did you meet these two girls?"
9 Now, at this time my partner was
10 talking to the two girls in the car.
11 So he said he met them in downtown
12 Buffalo that day, and that he had been
13 with them all day.

14 BY MR. WAGNER:

15 Q. When you asked Mr. Salter for his driver's license,
16 did you observe the money at that time?

17 A. Yes.

18 Q. Did you have occasion to count the money?

19 A. I asked Mr. Salter to count it, and then I re-counted
20 it and separated the Canadian money, and gave it back
21 to him.

22 Q. Could you tell us, please, how much money you recall
23 being in the wallet that day?

Excerpt of Testimony (Leo Fernan—Hearing).

- 1 A. Approximately \$900.
- 2 Q. Was that all Canadian or all American or a combination?
- 3 A. It was a combination.
- 4 Q. Do you know how it broke down?
- 5 A. It was smaller bills, tens, twenties. I would say
- 6 approximately \$500 Canadian, maybe more, maybe less.
- 7 Q. The remainder was American?
- 8 A. Yes.
- 9 Q. Mr. Fernan, when you first approached these people
- 10 at the bus station or at the loading area, did they
- 11 have tickets, did any of them have tickets?
- 12 A. Yes, the two girls had tickets.
- 13 Q. Did Mr. Salter have a ticket?
- 14 A. No.
- 15 Q. Could you tell us, please, what happened after you
- 16 counted the money and had Mr. Salter count the money?
- 17 A. We were still in the baggage room, and I asked him
- 18 where did he meet the girls. He said downtown Buffalo,
- 19 that he had been with them all day at a house. So
- 20 Mr. Chandler was still talking to the girls, I didn't
- 21 know how he was proceeding. He returned and said,
- 22 "You are under arrest," to Mr. Salter, because my
- 23 line of interrogation was going -- he wouldn't state

Excerpt of Testimony (Leo Fernan—Hearing).

1 that he brought the girls over from Canada or any-
2 thing.

3 Q. Could you tell us what happened after that?

4 A. Mr. Chandler came back and he said, "You are under
5 arrest," and I went over by the door, I wanted to
6 watch the car. Now, I didn't personally give him
7 his verbal rights, Chandler put him under arrest,
8 so I can't say for sure.

9 Q. What did you do then?

10 A. We proceeded to go out on the street. Mr. Salter's
11 car was behind the bus station. Mr. Chandler got
12 in our car with the two girls, and I took a walkie-
13 talkie and went with Mr. Salter. We proceeded up
14 Niagara Street to our office at 2151 Niagara.

15 Q. You went to your office in Mr. Salter's car, is that
16 correct?

17 A. Yes.

18 Q. Who was driving the car?

19 A. Mr. Salter.

20 Q. What happened to Mr. Chandler?

21 A. He was in our car with the two girls.

22 Q. When you say "our car" do you mean the Border Patrol
23 car?

Excerpt of Testimony (Leo Fernan—Hearing).

1 A. Yes.

2 Q. Did he follow you or precede you to the Border Patrol
3 office?

4 A. He followed right behind us.

5 Q. What did you do then?

6 A. We proceeded up to the office, which is approximately
7 five minutes, ten minutes, and we kept the girls
8 separated from Mr. Salter once we got into the office.

9 Q. What happened then?

10 A. When we got to the office I took out our form and
11 read him his rights. I asked him if he understood
12 it, he shook his head no. Then I asked him if he
13 could read, he said yes, and I asked him to read it.
14 I asked him if he understood it, and he still shook
15 his head no. I asked him if he wanted to sign it,
16 he said no, he just shook his head.

17 Q. What happened then?

18 A. Well --

19 Q. Did Mr. Salter stay at your office or was he trans-
20 ported elsewhere?

21 A. Approximately after a half hour, forty-five minutes
22 we transported him back down to the Erie County Jail,
23 because in the meantime the girls stated they were

Excerpt of Testimony (Leo Fernan—Hearing).

1 transported from Canada over here.

2 Q. Did Mr. Salter give you any statement while he was
3 at your office?

4 A. No, he didn't.

5 MR. WAGNER: I have no further questions. Thank
6 you.

7 CROSS EXAMINATION BY MR. NAPIER:

8 Q. Mr. Fernan, do you have any report which you gave to
9 any law enforcement agency, grand jury or the United
10 States Attorney?

11 A. Yes, sir. We have sworn statements from the girls
12 that we have given to the United States Attorney.

13 Q. Do you have any reports then?

14 A. Yes, our own.

15 Q. Could I see those?

16 A. I don't have them with me.

17 Q. Could they be produced?

18 MR. WAGNER: Your Honor, I'm not sure if I
19 understand exactly what Mr. Napier
20 wants them for. Is it his claim
21 that Mr. Fernan used them as a
22 basis for his testimony today?

23 MR. NAPIER: That could be one of the claims. I

Excerpt of Testimony (Leo Fernan—Hearing).

1 don't know whether he used them or
2 not.

3 MR. WAGNER: Could I perhaps examine Mr. Fernan
4 on that point?

5 THE COURT: All right.

6 BY MR. WAGNER:

7 Q. You say you prepared a report dealing with your
8 investigation of this case, is that correct?.

9 A. A report on our standard forms for the two girls,
10 of the apprehension report, and then we took sworn
11 statements from them.

12 Q. Have you had occasion since you prepared that report
13 to read it at all prior to coming here today?

14 A. Yes, I have, approximately a week ago.

15 Q. Did the testimony you gave today, did that follow
16 from the report or is that based entirely on your
17 own personal observations and your own memory of
18 what happened that day?

19 A. My own memory right now.

20 Q. Would you say that having read the report contributed
21 nothing to your testimony today that you would not
22 have been able to give based on your own memory?

23 MR. NAPIER: I object to that. That is for the

Excerpt of Testimony (Leo Fernan—Hearing).

1		Court to decide.
2	THE COURT:	Did you read the report?
3	THE WITNESS:	Yes.
4	THE COURT:	Before you came in today?
5	THE WITNESS:	Yes.
6	THE COURT:	In this particular case, without
7		establishing a precedent, turn over
8		the report to counsel.
9	MR. WAGNER:	Yes, sir.
10	THE COURT:	You've got two witnesses, haven't
11		you, two women that are going to tell
12		how they came in here?
13	MR. WAGNER:	Your Honor, we have two witnesses,
14		but they didn't seem to have any
15		bearing on Mr. Napier's motion to
16		suppress.
17	THE COURT:	No, but aren't they going to tell,
18		according to you, that this man
19		Salter brought them in?
20	MR. WAGNER:	That is correct.
21	THE COURT:	And they paid a fee?
22	MR. WAGNER:	That is correct.
23	THE COURT:	What are we fighting about here? The

1 only thing Mr. Napier is fighting
2 about is this sum of money.
3 MR. NAPIER: Correct.
4 MR. WAGNER: That is correct, and we responded --
5 THE COURT: Turn over the report. Is that Mr.
6 Salter in the back there?
7 MR. NAPIER: Yes, it is.
8 THE COURT: I want to be sure that the record
9 notes that he is present.
10 MR. NAPIER: I believe the stenographer knows that.
11 I can continue, your Honor, while
12 he is looking for that.
13 THE COURT: All right.
14 BY MR. NAPIER:
15 Q. Officer, it is my understanding that you initially
16 said that the three people who were left on the
17 platform at the Greyhound Bus Station were about to
18 board the bus, is that correct?
19 A. Yes, sir.
20 Q. Well, are you saying then that Mr. Salter was about
21 to board the bus?
22 A. We didn't know when we approached him.
23 Q. Well, you drew the conclusion that he was and you

Excerpt of Testimony (Leo Fernan—Hearing).

1 were wrong, correct?

2 A. Sir, anybody on the platform is supposed to wait
3 inside for the bus driver to take the tickets, they
4 are not supposed to be on the platform.

5 Q. Apart from that, you drew the conclusion and you
6 were in error, correct, you didn't find a ticket
7 on him?

8 A. No.

9 Q. Officer, also when you asked Mr. Salter to identify
10 himself, did he produce a license?

11 A. Yes, he did.

12 Q. Was it necessary for him to count the money to
13 identify himself?

14 A. Sir, at this time I didn't know that was him on
15 the license. It wasn't an immigration document or
16 a birth certificate.

17 Q. Officer, I don't think you are answering my question.
18 Was it necessary to count the money in his wallet
19 to find out his identity?

20 A. After he produced the license I wanted to know how
21 much was in there because it was a substantial --

22 Q. How does that identify him?

23 A. It doesn't.

Excerpt of Testimony (Leo Fernan—Hearing).

1 Q. How does it identify him if you in turn counted it
2 and broke it down so that it is approximately \$500
3 in Canadian and \$400 in American?

4 A. It doesn't identify him.

5 Q. You did all this before you actually arrested him?

6 A. Yes.

7 Q. What was your first indication, Mr. Fernan, that
8 something may be askew or there was some violation
9 of law?

10 A. When we approached the girls and heard their accent,
11 and then Mr. Salter's accent, we wanted to identify
12 them further because the girls stated -- we asked
13 where they were born, they said Buffalo with a high
14 English accent, and we wondered why Mr. Salter would
15 be in the company of these two girls with these
16 accents when he did not in fact have a Jamaican
17 accent.

18 Q. Is that -- I guess what I am concerned with -- is
19 that a violation of law to talk to or to listen
20 to somebody with a high English accent?

21 A. Is it a violation of law to have a high English
22 accent? No, sir.

23 Q. Or to listen to one?

Excerpt of Testimony (Leo Fernan—Hearing).

1 A. No, sir.

2 Q. Officer, what, in fact, had you asked the defendant
3 before he was placed under arrest?

4 A. I asked him for some identification after he had
5 stated -- we asked him his citizenship.

6 Q. When you say "we" --

7 A. Mr. Chandler and myself.

8 Q. Well, perhaps I'm mixed up. As I understand it, you
9 took Mr. Salter into the baggage room there, and Mr.
10 Chandler took the two girls into a patrol car?

11 A. Yes, sir.

12 Q. My question is what, in fact, did you do in the way
13 of inquiry of Mr. Salter on your own?

14 A. After seeing the license, then asking him to count
15 the money, I asked him where he lived in Buffalo at
16 that time. I can't remember the street address, but
17 I proceeded further, asking him where he met these
18 girls --

19 Q. But --

20 A. -- and when the last time was that he had been in
21 Canada.

22 THE COURT: Let me ask you this. What theory
23 were you operating on in counting his

Excerpt of Testimony (Leo Fernan—Hearing).

1 money or having him count it? I could
2 go, I assume, across that bridge
3 with a vast sum of money, what theory
4 do you advance that you required him
5 to produce his wallet and count his
6 money?

7 THE WITNESS: After we heard the accents -- after
8 we asked the two girls and Mr. Salter,
9 and we heard the accents, because
10 of the number of people we talked
11 to down there --

12 THE COURT: Well, did you suspect that he was
13 transporting aliens?

14 THE WITNESS: We did not know at that time, sir.

15 THE COURT: I have crossed the bridge and nobody
16 asked me to take my wallet out. Why
17 did you ask him to take it out?

18 THE WITNESS: I wanted to know where he got it.

19 THE COURT: Got the money?

20 THE WITNESS: Yes, sir.

21 THE COURT: Well, then you were suspicious at
22 that moment, in fact, you were
23 accusatory, that he was importing

Excerpt of Testimony (Leo Fernan—Hearing).

1 aliens for profit?

2 MR. WAGNER: Your Honor, I would like to object
3 to your use of the word "accusatory."

4 THE COURT: All right, you may object. Did you
5 hear my question?

6 THE WITNESS: Yes, sir. I asked him to produce
7 the money and his identification --

8 THE COURT: Why?

9 THE WITNESS: Because after I heard the two girls
10 with their accents --

11 THE COURT: At that point you thought that Salter
12 was importing aliens for profit,
13 right?

14 THE WITNESS: I thought this could be a possibility.

15 THE COURT: All right.

16

17 BY MR. NAPIER:

18 Q. Now, Officer, about how much time elapsed between
19 your discovery of the amount of money and Mr. Chandler's
20 reappearing on the scene?

21 A. Approximately between five and ten minutes.

22 Q. Now, did you arrest Mr. Salter before Mr. Chandler
23 returned?

Excerpt of Testimony (Leo Fernan—Hearing).

- 1 A. No, sir, I did not.
- 2 Q. You were just stopping him and holding him there?
- 3 A. Yes.
- 4 Q. And you knew at that point, did you not, that there
- 5 was a -- you were still suspicious in your mind, were
- 6 you not?
- 7 A. Yes, sir.
- 8 Q. And you had him produce the money, right?
- 9 A. Yes, sir.
- 10 Q. While you were suspicious?
- 11 A. Yes.
- 12 Q. You, yourself, counted the money while you were
- 13 suspicious?
- 14 A. I had him count it first, sir.
- 15 Q. Right, then you counted it?
- 16 A. Yes.
- 17 Q. So that you were considering putting him under arrest,
- 18 were you not?
- 19 A. At that point I ~~still~~ didn't know if he was a citizen
- 20 himself. I looked at the license, I did not see a
- 21 picture of him or a birth certificate.
- 22 Q. Well, most licenses don't have a picture on them, do
- 23 they?

Excerpt of Testimony (Leo Fernan—Hearing).

- 1 A. Not in New York State they don't.
- 2 Q. New York State operator's licenses?
- 3 A. Not in New York State they don't, sir.
- 4 Q. Didn't he produce a New York State operator's license?
- 5 A. Yes.
- 6 Q. You weren't suprised that there wasn't a picture on
- 7 it?
- 8 A. I wasn't suprised.
- 9 Q. Did the rest of the license, as far as you recall,
- 10 adequately describe him as to height, weight?
- 11 A. Approximately, yes.
- 12 Q. You had no reason to believe that it was somebody
- 13 else's license, did you?
- 14 A. I didn't know at that point, sir.
- 15 MR. NAPIER: May I see the report?
- 16 MR. WAGNER: Your Honor, before I give the report
- 17 to Mr. Napier, reading it over it
- 18 indicates there is nothing on the
- 19 report relating to the incident about
- 20 which Mr. Fernan is testifying. It
- 21 relates only to his discussion with
- 22 the two women that allegedly have
- 23 come into the country illegally.

Excerpt of Testimony (Leo Fernan—Hearing).

1		I feel that certainly for purposes
2		of this it will not help Mr. Napier
3		in any respect.
4	THE COURT:	That is not your problem. Turn it
5		over to Mr. Napier. He will look
6		at it himself.
7		(Thereupon report referred to was
8		marked Government's Exhibit 1 for
9		identification on the motion.)
10	THE COURT:	Did you inquire from the man where
11		he got all this money?
12	THE WITNESS:	Yes, sir.
13	THE COURT:	Did he answer you?
14	THE WITNESS:	Yes, sir. He said he was holding it
15		for his little brother.
16	THE COURT:	He did not say to you that he received
17		it for bringing these women into the
18		country?
19	THE WITNESS:	No, sir, he did not.
20	THE COURT:	All right.
21	MR. NAPIER:	May I take a minute to look at this,
22		your Honor?
23	THE COURT:	Yes.

Excerpt of Testimony (Leo Fernan—Hearing).

1	MR. NAPIER:	Would you mark that, please?
2	THE COURT:	Where are these two women now?
3	MR. NAPIER:	In New York City, I believe.
4	MR. WAGNER:	I believe that is correct.
5	THE COURT:	Are they released on --
6	MR. WAGNER:	They haven't been charged.
7	THE COURT:	I know that. They are material
8		witnsses, aren't they?
9	MR. WAGNER:	That is correct.
10	BY MR. NAPIER:	
11	Q.	While I am waiting, Officer, could I ask you --
12	THE COURT:	Why are they in New York City?
13	MR. NAPIER:	That is apparently where they wanted
14		to go.
15	THE WITNESS:	Am I to answer that?
16	THE COURT:	No.
17	MR. WAGNER:	I don't know, your Honor.
18	MR. NAPIER:	If I may suggest, your Honor, I think
19		I know. I believe that one of them
20		or perhaps both of them have relatives
21		here. It was probably cheaper to
22		put them there than to keep them
23		incarcerated.

Excerpt of Testimony (Leo Fernan—Hearing).

1 THE COURT: All right.

2 BY MR. NAPIER:

3 Q. Officer, do you have any memorandums yourself con-
4 cerning the incident, any personal notes?

5 A. No, sir.

6 Q. So that you are recalling this matter of the arrest
7 strictly from memory?

8 A. Yes.

9 Q. That is approximately six months ago. How many
10 people have you arrested in the approximate six
11 years you have been on the Border Patrol?

12 A. I couldn't say approximately, sir, probably five
13 thousand people.

14 Q. And you recall this incident distinctly?

15 A. Yes, sir.

16 (Thereupon documents previously
17 referred to were marked Defendant's
18 Exhibits 1 and 2 for identification
19 on the motion.)

20 BY MR. NAPIER:

21 Q. Officer, I am going to show you what has been marked
22 as pretrial Defendant's Exhibits 1 and 2 --

23 THE COURT: How many cases have you brought into

Excerpt of Testimony (Leo Fernan—Hearing).

1		federal court in those five thousand
2		arrests?
3	THE WITNESS:	Sir, out of the five thousand arrests,
4		probably four thousand eight hundred
5		have been aliens that have come across
6		the line in the southern border, when
7		I was stationed down --
8	THE COURT:	You are talking about the Mexican
9		border?
10	THE WITNESS:	Yes, sir, and up here.
11	THE COURT:	I don't understand what this sudden
12		zeal is in Buffalo and environs
13		over the Border Patrol's activities.
14		unless somebody has nothing else to
15		do in the prosecutor's office. I
16		have been here fifteen years, I have
17		had no cases like this, except I've
18		got several now. Is there something
19		in this country that I don't know
20		about, wherein these people have
21		assumed a sudden importance?
22	THE WITNESS:	Sir, I don't know. I just enforce
23		the immigration laws.

Excerpt of Testimony (Leo Fernan—Hearing).

1 THE COURT: All right. I grant you that these
2 people have to come in here on a
3 quota, but all of a sudden I have
4 all kinds of cases involving attempts
5 allegedly to import Jamaicans and
6 others into this country. I wasn't
7 aware that this country was so
8 prosperous presently and for the
9 last year or two that people wanted
10 to come here. Do you know anything
11 about that?

12 THE WITNESS: Yes, sir. There is approximately
13 five million aliens in the country
14 here now illegally. That is an
15 educated guess, approximately five
16 million in the United States.

17 MR. NAPIER: May I proceed, your Honor?

18 THE COURT: All right.

19 BY MR. NAPIER:

20 Q. Mr. Fernan, I have shown you what purports to be an
21 operator's license, is that correct?

22 A. Yes, sir.

23 Q. Does that look like the license which was shown to

Excerpt of Testimony (Leo Fernan—Hearing).

1 you at the time that you asked Mr. Salter to produce
2 an identification?
3 A. Yes, sir, to the best of my knowledge.
4 Q. All right. Would you flip it over to the backside,
5 does it have a picture of Mr. Salter on there?
6 A. Yes, sir.
7 Q. Is that what he produced at the time?
8 A. Sir, I can't remember the picture on there.
9 Q. Well, this license begins or is effective July 19,
10 1971, is it not?
11 A. Yes, sir.
12 Q. It expires May 31, 1974, is that correct?
13 A. Yes, sir.
14 Q. You are not denying that this was the operator's
15 license that he showed you, are you?
16 A. No, sir, he produced a license.
17 Q. You are not denying the picture was on the reverse
18 side?
19 A. I'm not denying it, I just don't remember.
20 Q. All right. This is a chauffeur's license, is it not?
21 A. Yes, sir.
22 MR. NAPIER: I believe that is all I have, your
23 Honor.

Excerpt of Testimony (Leo Fernan—Hearing).

1 REDIRECT EXAMINATION BY MR. WAGNER:

2 Q. Mr. Fernan, one question, when you first approached
3 Mr. Salter, you didn't ask him for the money in his
4 wallet, is that what you testified earlier?

5 MR. NAPIER: I object to the form.

6 THE COURT: Overruled.

7 THE WITNESS: Pardon me?

8 MR. WAGNER: Would you please read it back?
9 (Thereupon the last question was
10 read by reporter.)

11 THE WITNESS: Yes, sir.

12 BY MR. WAGNER:

13 Q. Can you tell us, please, whether or not you saw the
14 money prior to asking Mr. Salter for his identif-
15 ication?

16 A. I did not see the money prior to asking for his
17 identification.

18 Q. What was the first question you asked Mr. Salter
19 when you took him ~~into~~ the baggage area?

20 A. What his citizenship was, where he was born.

21 Q. What did you ask him then?

22 A. I asked if he had some identification.

23 Q. And when did he show you his wallet?

Excerpt of Testimony (Leo Fernan—Hearing).

1 MR. NAPIER: I object to that, your Honor.
2 THE COURT: Overruled.
3 THE WITNESS: After we came into the baggage room
4 he opened his wallet to take his
5 license out, and that is when I saw
6 the amount of money, when he opened
7 it to get his license.
8 MR. WAGNER: All right. Thank you.
9 RECROSS EXAMINATION BY MR. NAPIER:
10 Q. Well, but he didn't volunteer to count it in front
11 of you, did he?
12 A. No, sir.
13 Q. Did you ask him to count it in front of you?
14 A. Yes.
15 Q. Then you counted it?
16 A. Yes, sir.
17 Q. This had nothing to do with identification, did it?
18 A. No, sir.
19 Q. Didn't he satisfy the requirement of identification
20 by producing the license?
21 A. Not to my satisfaction, sir.
22 Q. Well, have you found through experience, Officer,
23 that most people do not carry a birth certificate or

Excerpt of Testimony (Leo Fernan—Hearing).

1 citizenship papers --

2 A. Yes, sir.

3 Q. -- or baptismal certificates?

4 A. Yes, sir.

5 Q. So that when you ask a person to identify himself,
6 in most instances they produce a license, do they
7 not?

8 A. A license or a sheriff's ID.

9 Q. All right. He produced a license, that product or
10 work product that most people produce, isn't it?

11 A. Possibly most of the time.

12 Q. And you did not -- did you frisk him, by the way?

13 A. Yes, sir, I did.

14 Q. When did that take place?

15 THE COURT: Is there anything going to be offered
16 from the frisk?

17 MR. WAGNER: No, there is not, your Honor.

18 THE COURT: But you want to know if they frisked
19 him on the theory he was under arrest?

20 MR. NAPIER: Yes, your Honor.

21 THE WITNESS: Yes, I did frisk him.

22 BY MR. NAPIER:

23 Q. But you frisked him while the other officer, Mr.

Excerpt of Testimony (Leo Fernan—Hearing).

- 1 Chandler, was off with the two women, is that correct?
- 2 A. Yes.
- 3 Q. You still hadn't arrested him?
- 4 A. No, sir.
- 5 Q. Did he produce anything else that helped identify
- 6 him?
- 7 A. There were pieces of paper that he had with telephone
- 8 numbers. I can't remember anything else at this
- 9 point with his name on it or --
- 10 Q. Did you give the pieces of paper back to him?
- 11 A. Yes.
- 12 MR. NAPIER: That is all I have.
- 13 BY MR. WAGNER:
- 14 Q. Mr. Fernan, in your experience as a Border Patrol
- 15 agent, dealing with aliens in this country, have
- 16 you had occasion for people you have stopped to
- 17 question to give you other forms of identification,
- 18 such as passports, visas, et cetera?
- 19 A. Yes, baptismal certificates, passports.
- 20 Q. You have received such documents in response to a
- 21 request for identification, is that correct?
- 22 A. Yes.
- 23 MR. WAGNER: I have no further questions.

Excerpt of Testimony (Leo Fernan—Hearing).

1 BY MR. NAPIER:

2 Q. Well --

3 THE COURT: Somebody has to be last here. I've
4 got other things to do.

5 MR. NAPIER: One final question, your Honor.

6 THE COURT: All right.

7 BY MR. NAPIER:

8 Q. Don't most people produce licenses, operator's
9 licenses, for identification, at the Greyhound Bus
10 Station?

11 A. Passports and birth certificates at the Greyhound
12 Bus Station are probably eighty percent.

13 Q. You mean of the people you ask?

14 A. Yes, sir, because of the proximity of the border.

15 MR. NAPIER: I have no further questions.

16 MR. WAGNER: No other questions, your Honor.

17 THE COURT: All right. Let me ask you something.

18 You said five million people are
19 illegal aliens in this country.

20 Over what period of time do you think
21 they accumulated?

22 THE WITNESS: Possibly, sir, since 1962. On the
23 southern border they used to have --

Excerpt of Testimony (Leo Fernan—Hearing).

1	THE COURT:	I'm not talking about the Mexican
2		farmhands, I'm talking about people
3		in this country, over this border,
4		you mean the totality would be five
5		million people?
6	THE WITNESS:	A total for the whole country would
7		possibly be five million.
8	THE COURT:	Those are the wetbacks you return
9		every night and they come back the
10		next day?
11	THE WITNESS:	No, I'm talking about New York City
12		also and --
13	THE COURT:	How many do you think we have over
14		the Canadian border illegally in
15		here?
16	THE WITNESS:	There are different nationalities,
17		sir, but I would say a quarter of
18		them come over the Canadian border.
19	THE COURT:	A quarter of the five million people
20		illegally in this country?
21	THE WITNESS:	Over this time period, yes, sir.
22	THE COURT:	What time period?
23	THE WITNESS:	The last ten or fifteen years.

Excerpt of Testimony (Leo Fernan—Hearing).

1 THE COURT: What is the incentive, in your
2 judgment?
3 THE WITNESS: Out of work, to go around the quota
4 system, to just get away from where
5 they were.
6 THE COURT: They are in Canada legally, aren't
7 they?
8 THE WITNESS: In Canada, yes, sir.
9 THE COURT: All right.
10 (Witness excused.)
11 MR. WAGNER: The Government has no further
12 witnesses, your Honor.
13 MR. NAPIER: Your Honor, I have no idea what the
14 other man, Mr. Chandler, would say.
15 It would appear on the basis of this
16 officer's testimony that he was not
17 directly in on the matter of arresting
18 this man nor did he confront him
19 in the questioning. So therefore,
20 I don't think it is necessary for
21 the Government to produce the other
22 officer.
23 THE COURT: It is up to you.

Excerpt of Testimony (Leo Fernan—Hearing).

1	MR. NAPIER:	Could I have just a minute, your
2		Honor?
3	THE COURT:	Yes.
4	MR. NAPIER:	He apparently knows nothing about
5		the money, your Honor.
6	MR. WAGNER:	Certainly he was not present, your
7		Honor, he was not involved.
8	THE COURT:	Is there any other proof?
9	MR. NAPIER:	No. I do not wish to produce my
10		client.
11	THE COURT:	Now, I want your best version, and
12		I want it by Friday, both sides, of
13		what you see in this proof and why
14		I should suppress this evidence.
15		Give it to me in a short memorandum.
16		You claim that you've got two witnesses,
17		the two women --
18	MR. WAGNER:	That is correct.
19	THE COURT:	-- that are ready to testify --
20	MR. WAGNER:	That is correct.
21	THE COURT:	-- they paid this man a sum of money?
22	MR. WAGNER:	That is correct.
23		* * *

